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No. 08-1176

In the Supreme Court of the United States

TYSON FORD,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

REPLY TO BRIEF IN OPPOSITION 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Brendlin v. California,
551 U.S. 249 (2007) 5

Florida v. Royer,
460 U.S. 491 (1983) 3, 4, 6, 8

Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004) 8

Michigan v. Chesternut,
0486 U.S. 567 (1988) 1

United States v. Battista,
876 F.2d 201 (D.C. Cir. 1989) 7

United States v. Drayton,
536 U.S. 194 (2002) 5

United States v. Jordan,
958 F.3d 1085 (D.C. Cir. 1992) 5, 7, 9

United States v. Lambert,
46 F.3d 1064 (10th Cir. 1995) 5

United States v. Lopez,
443 F.3d 1280 (10th Cir. 2006) 7, 8, 9

United States v. Mendenhall,
446 U.S. 544 (1980) 4, 6

United States v. Weaver,
282 F.3d 302 (4th Cir. 2002) 7, 9

REPLY TO BRIEF IN OPPOSITION

The undisputed facts of this case follow an all-too-common pattern: while retaining possession of Mr. Ford's driver's license, law enforcement officers probed him with investigative questions regarding potentially criminal matters. Several courts have correctly recognized that this pattern—retention of identification plus unrelated questioning—would lead any reasonable person to believe that they are no longer free to leave, transforming a "consensual" police encounter into a Fourth Amendment seizure. Pet. 9–15, 22–25. Other courts have refused to follow suit in similar cases, uncertain as to how much constitutional weight to attach to license retention or what concerns it should introduce into a Fourth Amendment analysis. Pet. 15–19, 25–26.

Unable to recognize this pattern, the government's brief in opposition instead fixates on the minute variances from one case to the next. But by claiming that these cases are "all distinguishable based on their different facts," Opp. 11, the government disrespects this Court's requirement that "consistent application from one police encounter to the next" is the hallmark of the Fourth Amendment's objective "reasonable person" seizure test. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). While each case cited by Petitioner has "its own facts," the courts have nevertheless divided over a common, uniform question: whether a consensual encounter with the police becomes a seizure when the police continue questioning the defendant while retaining his identification. This Court should therefore grant the petition for a writ of certiorari

and resolve this issue that has divided the state and federal courts.

1. Before turning to the case law, the government first attempts to recharacterize the factual circumstances of Mr. Ford's seizure. For instance, the government stresses that Mr. Ford was questioned while walking in a "high-crime area" and that he was "stuttering and breathing rapidly [and] that his hands were shaking" during his encounter with the police. Opp. 2–3. Perhaps the government cites these facts to legitimize the officers' decision to follow and interrogate Mr. Ford. But these facts are wholly irrelevant to the resolution of this case. The government has already conceded that, notwithstanding these facts, the officers lacked the reasonable suspicion necessary to justify any seizure. Pet. 6; Pet. App. 5a. Whether or not these allegations are true, the government has already conceded that they are irrelevant.

The government further protests that a portion of Mr. Ford's petition draws upon his testimony at his district court suppression hearing, claiming that this testimony "was not credited by the district court." Opp. 2–3 nn. 1–2. But the district court's opinion includes no such credibility determination, nor is its factual narrative inconsistent with Mr. Ford's testimony. *See generally* Pet. App. 17a–20a, 45a–48a. Furthermore, the nature of Mr. Ford's testimony is particularly important to this Court's review of the First Circuit's decision below, as the court of appeals incorrectly asserted that Mr. Ford did not testify at all. Pet. App. 12a–13a n.4.

In the end, the government's attempt to alter or ignore the facts of this case is not significant, because the critical facts remain uncontested. Mr. Ford was approached without any reasonable suspicion that he was engaged in criminal activity by police officers who pursued him by driving their marked police cruiser the wrong way down a one-way street. Pet. 2; Opp. 2. He volunteered his personal identification to the officers and answered their questions, but the police did not cease their inquiry. Pet. 3; Opp. 2–3. Instead of quickly running a warrants check, confirming Mr. Ford's identity, and then returning his driver's license, the armed and uniformed officers got out of their police car and approached him, prompting Mr. Ford to raise his hands in the air in response and ask "what's this all about?" Pet. 3–4; Opp. 3. At that time, the officers asked Mr. Ford whether he was carrying any weapons—a direct, investigatory question. Pet. 4; Opp. 3. If a reasonable person would not feel free to terminate the police encounter in such circumstances, then Mr. Ford was unconstitutionally seized.

2. To avoid the commonsense conclusion that police retention of personal identification, coupled with unrelated investigatory questioning, transforms a consensual encounter into a Fourth Amendment seizure, the government insists that there is no conflict between the decision below and this Court's decision in *Florida v. Royer*, 460 U.S. 491 (1983). Opp. 8–10. It is of course true that *Royer* addressed a different factual scenario: the police encounter occurred in an airport rather than on the street, and the police questioning was targeted toward an extant

narcotics investigation. Opp. 8. But *Royer*'s most critical element is the logic that led the Court to distinguish it from *United States v. Mendenhall*, 446 U.S. 544 (1980)—a distinction that the government tellingly does not address.

Just three years before *Royer*, the divided *Mendenhall* Court reviewed a factually-similar police encounter: two DEA officers approached Mendenhall in an airport, asked her for her identification and ticket, identified themselves as DEA agents, and asked her to accompany them to a private room. *See Royer*, 460 U.S. at 503 n.9 (discussing facts of *Mendenhall*). Despite the similarity between that case and *Royer*, the *Royer* plurality found that the two differed in "important respects," in part because in *Royer* the subject's identification "remained in the possession of the officers throughout the encounter" while in *Mendenhall* the "ticket and identification were immediately returned." *See id.* Thus, while identification retention was certainly one of "a variety of factors" at issue in *Royer*, *see* Opp. 9, it also was one of the only *distinctions* between *Royer*, and *Mendenhall*. Standing alone, license retention mattered. And this Court's focus on this factor in *Royer* supports the conclusion that the police's retention of Mr. Ford's license, coupled with other factors, effected a seizure upon him as well.

3. The government further protests that any "categorical rule" against identification retention during unrelated investigatory questioning "would be inconsistent with this Court's other cases" on the grounds that "for the most part *per se* rules are

inappropriate in the Fourth Amendment context." Opp. 10 (quoting *United States v. Drayton*, 536 U.S. 194, 201 (2002)). Yet, as the government is forced to concede, this Court *has* applied such clear rules in contexts in which "any reasonable" person would no longer feel free to terminate a police encounter. *See* Opp. 10 n.3 (discussing *Brendlin v. California*, 551 U.S. 249, 256–257 (2007)). Thus, in *Brendlin*, this Court held that a passenger is "seized" whenever a car in which he is riding is pulled over by the police. *Brendlin*, 551 U.S. at 256–257. The mere fact that the reasonable person standard is "necessarily imprecise," Opp. 10, does not mean that it is unsusceptible to consistent application based upon bright-line legal rules.

Thus, those courts of appeals that have adopted a *per se* rule against license retention have done so based on an express recognition that such a rule is justified by the universal importance of personal identification in modern society: "[A]bandoning one's driver's license (or other papers such as a passport, green card, or ticket if still in transit) is simply not a practical or realistic option for a 'reasonable' traveler in this day and age." *United States v. Jordan*, 958 F.3d 1085, 1087 (D.C. Cir. 1992); *see also United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995) ("[W]hen law enforcement officials retain an individual's driver's license in the course of questioning him, the individual, as a general rule, will not reasonably feel free to terminate the encounter."). Such an approach echoes this Court's decisions in *Brendlin* and similar cases, which recognize that categorical rules are appropriate in certain circumstances.

But even if a categorical rule is not appropriate here, the question remains—what role does identification retention play in a Fourth Amendment analysis, and how much weight should it be given when determining the perspective of an objective, reasonable person? The *Royer* Court, looking to distinguish its holding from *Mendenhall*, placed particular emphasis on the police's decision to retain a subject's license and ticket while continuing unrelated questioning. Pet. 27–31. The government now endorses a narrower rule, urging that the constitutional effects of retention should vary depending on where the subject is being questioned or whether the identification was originally requested by the police. Only this Court can step in to clarify the scope of *Royer*'s plurality holding and provide the lower courts with the guidance that they so sorely require.

4. To avoid the conclusion that the courts have divided regarding the constitutional implications of identification retention, the government makes a bold attempt to harmonize the decisions of several circuits based on tiny factual distinctions. In the process, the government fails to address the logic underlying those decisions that have assigned additional importance to the effects of license retention.

The Petitioner already has shown the breadth and depth of the current divide among the federal and state courts regarding the effect of license retention in a seizure analysis. Pet. 9–26. Nonetheless, even under the narrowest possible construction of that split, the decision below and

United States v. Weaver, 282 F.3d 302 (4th Cir. 2002), remain in conflict with decisions of the D.C. and Tenth Circuits. *See Jordan*, 958 F.2d 1085; *United States v. Lopez*, 443 F.3d 1280 (10th Cir. 2006).

With respect to *Jordan*, the government stresses that the person seized in that case was "getting into his car to leave [a] bus terminal," whereas Mr. Ford was "walking along a public street when the officers approached him." Opp. 12. But the D.C. Circuit's holding was in no way contingent upon this difference. Although the court of appeals did note that the nature of a person's "immediate business" was relevant to a Fourth Amendment seizure analysis, *see Jordan*, 958 F.2d at 1088, it also recognized that if "identification is not returned to [a] detainee it is difficult to imagine that any reasonable person would feel free to leave without it," especially when "combined with the fact that the police continued to retain the license" during questioning. *See id.* at 1087 (quoting *United States v. Battista*, 876 F.2d 201, 205 (D.C. Cir. 1989)), 1089. Tellingly, the government makes no effort to explain how this language does not articulate the same blanket rule proposed by petitioner here. If anything, the *Jordan* court's discussion of "immediate business" only strengthens Mr. Ford's argument, as he, like Jordan, was attempting to leave the area of the police encounter.

The government's treatment of *Lopez* is similarly flawed. Although the government underscores that there the officer instructed the subject to remain by his vehicle while the officer returned to his patrol car

to conduct a warrants check, Opp. 13 (citing *Lopez*, 443 F.2d at 1286), the *Lopez* court found that the license retention became "undue" within seconds of the officer's receipt thereof—i.e., before any instructions regarding Lopez's movement were made. *See* 443 F.2d at 1285–1286. Once again, the court of appeals' legal analysis directly conflicts with the position taken by the First Circuit below.

The government's final refuge is to claim that, because Mr. Ford volunteered his driver's license to the police, his case is factually distinguishable from any case in which the police demanded surrender of a subject's identification. Opp. 11. But this Court's decisions establish that the police are constitutionally free to request a subject's identification without triggering Fourth Amendment scrutiny. *Royer*, 460 U.S. at 501 (asking for license and ticket "were no doubt permissible in themselves"); *see also Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004); Opp. 6. These decisions make clear that such a distinction cannot bear the constitutional significance urged by the government—it cannot be that the police may request a person's identification with impunity *and yet* the constitutional analysis radically changes when a subject has the foresight to anticipate such a request, rather than waiting for the police to put it at issue. Perhaps such a rule might make sense if Mr. Ford had initiated his encounter with the police, but not where, as here, the police approached him by driving their cruiser the wrong way down a one-way street without reasonable suspicion regarding him.

Therefore, the First Circuit below correctly recognized the conflict between its holding and *Weaver*, on one hand, and *Jordan* and *Lopez* on the other. *See* Pet. App. 12a (following *Weaver* rather than *Jordan*); *see also Weaver*, 282 F.3d at 313 (declining to follow *Jordan*). Whether or not these cases are viewed as creating categorical rules against license retention, *see* Pet. App. 12a, they unquestionably assign a different, greater weight to such retention as part of a Fourth Amendment seizure analysis. This Court's intervention is warranted to address this discrepancy, explain *Royer*'s meaning, and establish a more uniform constitutional treatment of identification retention.

5. Finally, the government never once contests that this case addresses an issue of national importance. Pet. 33–35. Nor does it challenge that the question presented controls the resolution of this case. Pet. 35.

CONCLUSION

For the reasons set forth both above and in the petition for writ of certiorari, this Court should grant the petition and review the First Circuit's erroneous decision below.

Respectfully submitted,

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